

Obj. Deadline and Time: May 3, 2019 at 11:30 a.m. ET

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE:

**SEARS HOLDINGS CORPORATION, *et al.*,

Debtors.**

CHAPTER 11

**CASE NO. 18-23538-RDD

(Jointly Administered)**

**SUPPLEMENTAL OBJECTION AND RESERVATION OF RIGHTS OF THE KROGER
CO. TO THE PROPOSED CURE AMOUNTS IN CONNECTION WITH THE
DEBTORS' PROPOSED ASSUMPTION AND ASSIGNMENT OF CERTAIN LEASES
(DOCKET NO. 3298)**

TO THE HONORABLE ROBERT D. DRAIN,
UNITED STATES BANKRUPTCY JUDGE:

The Kroger Co. ("Kroger"), by its undersigned counsel, FROST BROWN TODD LLC, hereby files this supplemental objection and reservation of rights (this "Supplement") to the above-captioned debtors' (the "Debtors") *Notice of Assumption and Assignment of Additional Designatable Leases* (Docket No. 3298) (the "Supplemental Notice of Assumption and

Assignment”).¹ In support of this Supplement, Kroger respectfully states:

BACKGROUND

1. On October 15, 2018 (the “Petition Date”), the above-captioned debtors (the “Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of New York (this “Court”).

2. The Debtors lease from Kroger certain real properties owned by Kroger pursuant to certain unexpired leases (each a “Kroger Lease” and, collectively, the “Kroger Leases”). Specifically, the Debtors are currently leasing space from Kroger at: (i) Suite 1020, 3200 Lake Emma Road, Lake Mary, Florida, identified by the Debtors as Store No. 49012 (the “Lake Mary Leased Premises”); and (ii) 3071 Dixie Highway, Erlanger, Kentucky, identified by the Debtors as Store No. 3029 (the “Erlanger Leased Premises”)² and, together with the Lake Mary Leased Premises, the “Leased Premises”).

3. On November 1, 2018, the Debtors filed their *Motion for Approval of Global Bidding Procedures* (Docket No. 429) (the “Sale Motion”) seeking, among other things, approval of procedures to market, auction, and sell the Debtors’ real estate and other assets as a going concern, separated into: (i) procedures that apply to certain “go-forward” stores and related assets that the Debtors have deemed profitable; and (ii) global procedures that apply to the Debtors’ remaining

¹ Capitalized but undefined terms used in this Supplement shall have the meanings ascribed to them in the Supplemental Notice of Assumption and Assignment, the Original Assumption and Assignment Notices, or the Sale Motion, as defined in this Supplement and as applicable.

² Edgewood Plaza Holding, LLC is the owner of the Erlanger Leased Premises and is a subsidiary of Kroger.

assets that are not sold as part of the “go-forward” stores (collectively, the “Sale”).

4. On November 19, 2018, this Court entered its *Order Approving Global Bidding Procedures and Granting Related Relief* (Docket No. 816) (the “Sale Procedures Order”) which, among other things, approved the Sale Motion.

5. On December 11, 2018, in connection with the Debtors’ proposed sale of the Sears Home Improvement (“SHIP”) business, Kroger filed its *Objection of The Kroger Co. to the Notice of Assumption and Assignment in Connection with the Sears Home Improvement Business* (Docket No. 1132) (the “SHIP Cure Objection”) whereby Kroger objected to the proposed cure amounts in connection with the Kroger Lease for the Lake Mary Leased Premises.

6. Based on information and belief, on January 14, 2019, the Debtors commenced an auction for the sale of the Global Assets (the “Auction”) whereby the Debtors selected an offer by Transform Holdco, LLC (the “Buyer”), established by ESL Investments, Inc., as the highest and/or best offer for all or substantially all of the Global Assets including, potentially, the SHIP assets.

7. In connection with the Sale Procedures Order, on January 18, 2019, the Debtors filed the *Notice of Successful Bidder and Sale Hearing* (Docket No. 1730) (the “Notice of Successful Bidder”) stating that the Buyer was the highest or best offer for all or substantially all of the Global Assets including, potentially, the SHIP assets.

8. On January 18, 2019, the Debtors filed the *Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction* (Docket No. 1731) (the “First Notice of Potential Assumption and Assignment”), and on January 23, 2019, the Debtors filed the *Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global*

Sale Transaction (Docket No. 1774) (the “Second Notice of Potential Assumption and Assignment” and, together with the First Notice of Potential Assumption and Assignment, the “Original Assumption and Assignment Notices”).

9. The Original Assumption and Assignment Notices identified certain executory contracts and unexpired leases that the Debtors might assume and assign as part of the Sale, including the Kroger Leases.

10. As provided in the Notice of Successful Bidder and the Original Assumption and Assignment Notices, objections to, among other things, the Sale to the Buyer, proposed cure amounts, and the potential assumption and assignment of leases and contracts were due by January 26, 2019 at 4:00 p.m. (Eastern).

11. On January 25, 2019, Kroger timely and properly filed its *Reservation of Rights of The Kroger Co. to the Assumption and Assignment of Leases in Connection with the Global Asset Sale Transaction* (Docket No. 1948) (the “Kroger Reservation of Rights”).

12. In the Kroger Reservation of Rights, Kroger reserved its rights to, among other things:

(a) supplement and/or amend this Reservation of Rights and to assert any additional objections with respect to the cure amount and any proposed assignment of the Kroger Leases on any and all grounds; (b) amend the Cure Amount; (c) assert any nonmonetary defaults under the Kroger Leases; (d) assert any rights for indemnification or contribution against the Debtors arising under the Kroger Leases; (e) object to any proposed assignee’s adequate assurance of future performance; and (f) assert any further objections as it deems necessary or appropriate.

Kroger Reservation of Rights, ¶ 14.

13. In the Kroger Reservation of Rights, Kroger also reserved the right:

to amend or supplement the Cure Amount from time to time and at any time, and requests that the Debtors remain liable for, among other things: (a) post-petition charges or interest due under the Kroger Leases; (b) any non-monetary defaults; and/or (c) insurance and

indemnification obligations under the Kroger Leases.

Kroger Reservation of Rights, ¶ 11.

14. On February 8, 2019, this Court entered its *Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith (and) (IV) Granting Related Relief* (Docket No. 2507) which, among other things, approved the Sale. Based on information and belief, the Sale closed on February 11, 2019.

15. On April 5, 2019, the Debtors filed the Supplemental Notice of Assumption and Assignment which schedules the Kroger Leases for assumption and assignment. The Debtors propose: (i) \$0.00 as the aggregate amount necessary to cure the defaults under the Kroger Lease for the Lake Mary Leased Premises; and (ii) \$0.00 as the aggregate amount necessary to cure the defaults under the Kroger Lease for the Erlanger Leased Premises (collectively, the “Proposed Cure Amounts”).

16. As provided in the Supplemental Notice of Assumption and Assignment, Supplemental Objections are due on or before May 3, 2019 at 11:30 a.m. (prevailing Eastern Time).

SUPPLEMENTAL OBJECTION

17. Kroger fully restates and reincorporates the Kroger Reservation of Rights as if fully re-written herein.

18. Kroger objects to the Proposed Cure Amounts and hereby supplements the Cure Amount to include additional outstanding amounts due and owing to Kroger pursuant to the terms

of the Kroger Leases that accrued after the filing of the Kroger Reservation of Rights and must be remitted to Kroger as part of the assumption and assignment of the Kroger Leases. As of the date of this Supplement, the Cure Amount for the Kroger Leases is in the aggregate amount of \$185,914.47, as reflected on the chart below. Accounts receivable statements from Kroger reflecting the Cure Amount are attached hereto as **Exhibit A**.

Leased Premises	Proposed Cure Amount	Cure Amount
Lake Mary Leased Premises	\$0.00	\$119,179.46
Erlanger Leased Premises	\$0.00	\$66,735.01
<i>Cure Amount</i>		<i>\$185,914.47</i>

RESERVATION OF RIGHTS

19. Nothing in this Supplement is intended to be, or should be construed as, a waiver by Kroger of any of its rights under the Kroger Leases, the Bankruptcy Code, or applicable law. Kroger expressly reserves all such rights including, without limitation, the right to: (a) supplement and/or amend this Supplement and to assert any additional objections with respect to the Cure Amount and/or any proposed assumption and assignment of the Kroger Leases; (b) amend the Cure Amount; (c) assert any nonmonetary defaults under the Kroger Leases; (d) assert any rights for indemnification or contribution against the Debtors arising under the Kroger Leases; and (e) assert any further objections with respect to the relief requested that may subsequently be sought by the Debtors and/or any other party, as such requested relief relates to the Kroger Leases and/or the interests of Kroger.

CONCLUSION

20. WHEREFORE, Kroger respectfully requests that this Court enter an order: (a) sustaining this Supplement; and (b) granting Kroger such other and further relief as this Court deems

just and appropriate under the circumstances.

Dated: May 3, 2019
Cincinnati, Ohio

Respectfully submitted,

By: /s/ Ronald E. Gold

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2019, a copy of the foregoing was served electronically or via First Class Mail, postage prepaid upon all those identified on the Master Service List as of January 25, 2019 in accordance with this Court's: (i) *Amended Order Implementing Certain Notice and Case Management Procedures* entered November 1, 2018 (Docket No. 405); and (ii) *Order Approving Global Bidding Procedures and Granting Related Relief* entered November 19, 2018 (Docket No. 816) and the service requirements established thereby.

/s/ Ronald E. Gold
Ronald E. Gold

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